HONG LEONG FINANCE BHD

v.

TIARA ETIKA (M) SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
T SELVENTHIRANATHAN J
[WRIT NO: D7-22-1187-2001]
17 MAY 2002

CONTRACT: *Claim for money lent - Demand for payment - Whether prior demand a prerequisite to commencement of action*

The plaintiff applied to enter final judgment against the defendant summarily under O. 14 of the Rules of the High Court 1980 for monies due and payable under a short-term loan which had been granted to the defendant. The deputy registrar heard the application and awarded judgment in favour of the plaintiff. This was the defendant's appeal against that decision. The defendant's sole argument was that the plaintiff had no cause of action against the defendant as there had been no prior notice of demand on the defendant to pay the loan monies, as required by the terms of the agreement entered into between the parties.

Held:

[1] The documentary evidence showed that the loan was granted for a one-year period and it came due to be paid in full on 12 November 1997. It also showed that the lender had the option to recall the loan prior to the expiry of the one-year tenure if the borrower defaulted in complying with the conditions applicable to the loan. Only in such an instance would a prior demand be necessary. (p 24 b-d)

[2] None of the provisions of the documents adduced in evidence required the plaintiff to make a demand on the defendant for the repayment of all monies owing on or after 12 November 1997. On the contrary, these provisions were exhortations to the defendant to make a requisite payment on that date. Therefore, the plaintiff was within its rights to commence this action without making a prior demand. (pp 28 g-i & 29 a)

[Appeal dismissed. Decision of deputy registrar in respect of O.14 application confirmed.]

Case(s) referred to:
AlliedBank (Malaysia) Bhd v. Yau Jiok Hua [1998] 2 CLJ 33 ***(not foll)***
Ng Hee Thoong and Anor v. Public Bank Bhd [1995] 1 CLJ 609 ***(refd)***
Public Bank Bhd v. Chan Siok Lie & Ors [1989] 2 MLJ 305 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 14

Other source(s) referred to:
Reissue of Mallal's Digest of Malaysian and Singapore Case Law, 2001, 4th edn, vol 2(3),

[The defendant has appealed to the Court of Appeal vide Civil Appeal No: W-02-452-02.]

For the defendant/appellant - R Ratha Davi; M/s SG Lingam & Co
For the plaintiff/respondent - Ng Sai Yeang; M/s Raja, Darryl & Loh

Reported by Raja Vishnu Sivarajah

JUDGMENT

T Selventhiranathan J:
Pursuant to a merger agreement entered into between another financial institution known as the Credit Corporation (Malaysia) Berhad ("CCMB") and the plaintiff, all the assets and liabilities of the former became vested in the latter with effect from the 1 January 2001 pursuant to an order of court made on 29 December 2000, *vide* the High Court in Malaya at Kuala Lumpur Commercial Division originating summons No D6-24-325-2000, in accordance with the provisions of s. 50 of the Banking and Financial Institutions Act 1989. With that, the plaintiff stepped into the shoes of CCMB for all intents and purposes.

On 3 July 2001, the plaintiff commenced the action herein against the defendant for monies due and payable under a twelve-month short-term loan which had been granted by CCMB to the defendant in accordance with the terms and conditions in the documentation constituting the loan agreement entered into between them on 12 November 1996. By paras. 4.3b and 8 of its statement of claim, the plaintiff alleged that the defendant had breached the terms of the loan agreement by failing to settle the loan upon the agreed terms, and it therefore sought, by para. 13 of the statement of claim, judgment for the following amounts of monies:

(a) a total sum of RM4,950,491.13;

(b) interest on that sum at a rate 2.5% per annum above the plaintiff's base lending rate of 7.95% per annum on monthly rests, commencing from the 1 May 2001 until the date of full settlement;

(c) additional interest for late payment of that sum at a rate of 1% per annum on monthly rests, commencing from 1 May 2001 until the date of full settlement; and

(d) costs.

The defendant entered its appearance to this action on 2 August 2001. On the 15 August 2001, the plaintiff applied to enter final judgment against the defendant summarily under O. 14 of the Rules of the High Court 1980 *vide* encl. (5) ("the O. 14 application"). The O. 14 application was supported by an affidavit affirmed on behalf of the plaintiff and filed as encl. (4). The affidavit at encl. (4) essentially reiterated the averments in the statement of claim and in addition exhibited the various loan documents executed in relation to the loan agreement as well as other relevant documents comprising the following:

(a) a letter of offer dated 12 November 1996, a memorandum of acceptance of the offer by the defendant dated 12 November 1996, and a promissory note dated 12 November 1996 executed by the defendant as borrower unconditionally promising to pay the lender (ie CCMB) or any other holder of the note the principal sum of RM2,813,000 on 12 November 1997 together with interest thereon at a rate of 2.25% per annum above the prevailing base lending rate of the lender (exh. "WCS1");

(b) an extract of a resolution passed by the board of directors of the defendant company accepting the offer of the term-loan facility of RM2,813,000 from the lender as contained in the letter of offer dated 12 November 1996 and further authorising one Dato' Zainalabidin bin Noordin, a director of the defendant company, to sign all documents related thereto (exh. "WCS2");

(c) a vesting order made by the High Court in Malaya at Kuala Lumpur, whereby the assets and liabilities of CCMB became vested in the plaintiff (exh. "WCS3");

(d) a notice of demand from the previous solicitors of the plaintiff to the defendant dated 26 February 2001 demanding payment of the sum specified therein (exh. "WCS4"); and

(e) a certificate of indebtedness for the sum of RM4,950,419.13 and additional interest on that sum at a rate of 1% per annum with monthly

rests from 1 May 2001 until the date of realisation, which were said to be due and owing to the plaintiff from the defendant under the loan facility granted to the defendant (exh. "WCS5").

The defendant filed its affidavit in reply to the plaintiff's O. 14 application on 21 September 2001 *vide* encl. (6). This affidavit was affirmed on behalf of the defendant by the said Dato' Zainalabidin bin Noordin and constituted nine brief paragraphs as follows:

1. Saya adalah pengarah syarikat defendan di dalam tindakan ini dan mempunyai kuasa sepenuhnya untuk mengikrarkan afidavit ini bagi pihak defendan.

2. Segala fakta yang dinyatakan di sini adalah benar di dalam pengetahuan saya sendiri dan/atau dari rekod-rekod/dokumen di dalam milikan saya kecuali dinyatakan sebaliknya.

3. Saya memohon kebenaran Mahkamah yang mulia ini untuk merujuk kepada saman dalam kamar plaintif bertarikh 15/8/2001 dan afidavit sokongan Wong Chin Seong yang diikrarkan pada 13/8/2001 (selepas ini dirujuk sebagai afidavit tersebut).

4. Saya menafikan kandungan perenggan 3 afidavit tersebut dan meletakkan plaintif di atas beban bukti yang kukuh.

5. Saya menafikan kandungan perenggan 4 dan 5 afidavit tersebut dan seterusnya menafikan bahawa defendan berhutang kepada plaintif.

6. Perenggan 6 afidavit tersebut dinafikan dan saya mengatakan bahawa defendan mempunyai pembelaan bermerit.

7. Merujuk kepada perenggan 7 afidavit tersebut saya tidak mempunyai pengetahuan mengenai perintah letakhak bertarikh 29/12/2000 dan menafikan bahawa defendan menerima surat tuntutan bertarikh 26/2/2001 daripada Tetuan Iqbal Hakim, Sia & Voo.

8. Seterusnya saya juga ingin mengatakan bahawa defendan tidak mempunyai pengetahuan mengenai perenggan 8, 9 dan 10 afidavit tersebut dan plaintif diletakkan di atas beban bukti yang kukuh.

9. Oleh yang demikian dengan rendah diri saya memohon supaya saman dalam kamar plaintif ditolak dengan kos.

The deputy registrar of this court ("the registrar") heard the O. 14 application and granted judgment in favour of the plaintiff in accordance

a therewith. The defendant appealed against his decision to the judge in chambers *vide* encl. (8).

When the appeal in encl. (8) came to be heard before me, the learned counsel for the defendant, Cik Ratha Davi, raised one issue only as being triable and meriting the defendant being given leave to defend this action *b* and proceed to trial. According to her, the triable issue was raised in para. 7 of the defendant's affidavit at encl. (6), to wit, the defendant denied having received the notice of demand dated 26 February 2001 from the previous solicitors for the plaintiff.

c She argued that, in these circumstances, the plaintiff had no cause of action against the defendant, and that this action, therefore, should not have been filed as there had been no prior notice of demand on the defendant to pay the loan monies, as required by the terms of the agreement entered into between the parties. She referred to the letter of offer dated 12 November *d* 1996 wherein under cl. (1) headed "remedies" the following appears:

> **In the event we recall the loan**, we shall be at liberty to exercise all our rights under the security documents to recover the outstanding amount ... [Emphasis provided by the learned counsel for the defendant in her outline of written submissions]

e She thus contended that by virtue of this provision it was incumbent upon the plaintiff to properly recall the loan before claiming from the defendant the monies due under the loan agreement. The plaintiff had exhibited the notice of demand dated 26 February 2001 at encl. (4), which notice had purportedly been sent to the defendant by AR registered post. However, the *f* plaintiff had failed to exhibit the AR registered card which would show the acknowledgment of the receipt of the notice of demand by the defendant. This in turn raised serious doubts as to whether the defendant had indeed received the notice of demand, especially so when this was denied by the defendant. The learned counsel for the defendant cited in support of her *g* argument the case of *AlliedBank (Malaysia) Bhd v. Yau Jiok Hua* [1998] 2 CLJ 33, and an excerpt from vol. 2(3) of the 4th edn, 2001 *Reissue of Mallal's Digest of Malaysian and Singapore Case Law* where reference was made to the case of *Southern Bank Bhd v. Mega Lestari (M) Sdn Bhd and Others*.

h In conclusion she argued that as the plaintiff had failed to rebut the defendant's contention that it had not received the notice of demand, the

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plaintiff was precluded from claiming otherwise on the basis of the authority of *Ng Hee Thoong and Another v. Public Bank Bhd* [1995] 1 CLJ 609.

Cik Ng Sai Yeang, the learned counsel for the plaintiff, on the other hand, contended that the loan was to have been repaid within twelve months of the letter of offer dated 12 November 1996 or out of the proceeds of the sale of shares in Seloga Holdings Berhad, whichever was the earlier. The loan had been granted to purchase those shares. The defendant had defaulted on the loan by not settling it within the specified twelve months, ie, by 12 November 1997, and the default had not been remedied until the present. She went on to state that the plaintiff did make a demand for the repayment of all sums due under the loan by its notice of demand dated 26 February 2001 exhibited in "WCS4" to encl. (4), and in the light to the defendant's failure to make the repayment, the plaintiff had a right of action which was duly commenced against the defendant.

However, she argued that the defendant's contention that the plaintiff was required to but had not made such a demand for the repayment of the loan was untenable as the plaintiff was not obliged to make the same prior to instituting legal action against the defendant. Despite this the plaintiff had in fact sent such a demand to the defendant through the plaintiff's solicitors.

She proceeded to argue that the defendant's contention that the plaintiff was required to recall the loan prior to instituting legal action was a red herring since the loan was already due and payable at the time this legal action was instituted. She argued that the cases of *AlliedBank (Malaysia) Bhd (supra)*, and *Southern Bank Bhd (supra)* were properly decided on their facts but were not relevant to this action because in those cases liability was premised upon a due demand being made, and that that was not the case here. Accordingly, she applied for the appeal in encl. (8) to be dismissed with costs.

Having heard the arguments of the learned counsel for both parties, I am of the view that the contention of the defendant is without merit.

I have reproduced above in full the affidavit in opposition of the defendant at encl. (6) to show that that affidavit, except for para. 7 therein, is the sort of affidavit that the court would be justified in rejecting out of hand. The affidavit is a sad commentary on the attitude and approach taken by solicitors generally in drafting affidavits in order to meet O. 14 applications where the defence has no leg to stand on. Time and again the courts have commented adversely on affidavits which contain no matter of substance and

are affirmed merely to deny positive averments of facts by the plaintiffs and which seek to put the burden of proving every factual assertion on the plaintiffs while feigning ignorance of that assertion or denying it, without more. Such affidavits should not be countenanced and stand to be rejected outright as being unworthy of consideration. The saying that a drowning man clutches at straws would be an apt description of the situation in such cases.

The documentary exhibits in the present action clearly show that the loan was granted for a one-year period and it came due to be paid in full on 12 November 1997. The learned counsel for the defendant took the opening words of cl. (1) under the heading "remedies" in the letter of offer (reproduced earlier in this judgment) out of context to insist that there should be a prior demand for the repayment of the loan even after the expiry of its one-year tenure before any action could be instituted. The documents in exh. "WCS1" to encl. (4) clearly show that the lender had the option to recall the loan prior to the expiry of the one-year tenure if the borrower defaulted in complying with the conditions applicable to the loan. Only in such an instance would a prior demand be necessary. This is clear from the wording of cls. (h) and (k) in the letter of offer which read as follows:

> (h) Repayment
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> (i) Quarterly interest at the prescribed rate shall be paid in arrears on the last day of each prescribed month commencing from the month on which the loan is drawndown until the loan is repaid in full. Provided always that there shall be a minimum interest payable which sum shall be the amount equivalent to interest for three (3) months on the loan, notwithstanding that the principal amount of the loan is repaid within a period less than three (3) months from the date hereof.
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> (ii) *The principal amount of the loan shall be repaid by way of bullet repayment at the end of 12 months from the date of this letter, OR out of the proceeds from the sale of the SHB shares in the event the same is disposed of, whichever the earlier* [sic].
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> (iii) Notwithstanding the foregoing the loan including interest thereon and all such other incidental charges shall be repayable on demand at the absolute discretion of Credit Corporation (Malaysia) Berhad.
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> (i) ...
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> (j) ...

(k) Events of Default

The following shall be the events of default under the loan hereby granted and the occurrence of any one thereof shall render all outstanding sums under or incidental to the loan whether principal or interest becoming immediately repayable and in which event we shall be entitled at our discretion to exercise all our rights and remedies pursuant to this letter and the securities created by you in our favour to recover all such outstanding sums against you. The said events of default are:

(i) *your failure to make payment pursuant hereto whether the same relates to interest, principal sum or such other fees or charges in relation to the loan*;

(ii) if you are deregistered by any governing authority or wound up by any court or if any step is taken by any party in respect of your deregistration or winding-up, as the case may be;

(iii) if for any reason whatsoever, the security arrangement herein cannot be completed or suffers a defect under the law or otherwise;

(iv) *if you are unable to comply with any one of your obligations pursuant to the other security documents*;

(v) if the price quoted at the Kuala Lumpur Stock Exchange in respect of SHB shares does not reach or falls below RM2.90 per share.

Provided always that we reserve our rights to recall the loan and demand for repayment of all sums payable hereunder at any time and at our sole discretion without assigning any specific reason thereto. [Emphasis added]

Clause h(ii) clearly stipulated that the principal amount of the loan was to be repaid by way of a "bullet" repayment, ie by a single repayment, at the end of twelve months from 12 November 1996 or out of the proceeds of the sale of the shares in Seloga Holdings Berhad in the event the same were disposed of, according to whichever event occurred earlier. Therefore, since the shares were not disposed of earlier (there being no contrary evidence to that effect), the loan became repayable on 12 November 1997, at which date a cause of action to bring proceedings for the recovery of the loan crystallised and came to be reposed in the plaintiff. This accords with the provisions of the promissory note issued by the defendant in respect of the loan wherein the defendant unconditionally promised to pay, on 12 November

1997, to the order of CCMB as the lender or to any other holder of the promissory note the principal sum of RM2,813,000 together with interest as stipulated. To my mind, the contents of the promissory note put paid to the contention that a prior notice of demand for the repayment of the loan must be issued before an action could be instituted to recover all monies due under the loan agreement. In addition, there were also breaches of cls. (k)(i) and (k)(iv) of the letter of offer, independently of each other, which triggered the requirement for all outstanding sums becoming immediately repayable pursuant to cl. (k). Therefore, on 12 November 1997 a duty was cast upon the defendant to repay immediately all monies due under the loan agreement without further ado. It did not make an iota of difference to this duty that the plaintiff did not commence proceedings for the recovery of the monies until 3 July 2001 when this action was filed.

The *ratio decidendi* in *AlliedBank (Malaysia) Bhd (supra)* is not applicable to the present action as the question whether a prior demand for the repayment of the loan in that case had to be made first was never in issue there. The demand there had been made in accordance with condition 8 of the applicable letter of offer (see p. 10 of the report of that case where repayment was stipulated to be made "on demand"). What was in issue there, *inter alia*, was the admissibility in evidence of the documents which communicated the demand to the defendant. That case therefore is of no assistance to the defendant in the present action.

Similarly, the excerpt from *Mallal's Digest of Malaysian and Singapore Case Law* clearly shows that in the case of *Southern Bank Bhd* referred to in the excerpt "the agreement clearly provided for a letter of demand to be sent" to the defendant before the plaintiff could file the writ. As explained earlier in this judgment, no letter of demand was necessary on and after 12 November 1997 when the plaintiff's cause of action became crystallised upon the defendant failing to repay the loan in accordance with the provisions of the loan documents. I do concede that the defendant's contention for the necessity of a prior demand may hold some water to merit serious consideration if the plaintiff had elected to recall the loan before the expiry of its twelve-month tenure. However, that is not in issue here and I therefore do not venture to state any opinion thereon.

Having said all that, an authority which is more relevant and applicable to the facts of the present action is the case of *Public Bank Bhd v. Chan Siok Lie and Others* [1989] 2 MLJ 305, cited by the learned counsel for the plaintiff. In that case, Shankar J (as he then was) considered whether

in all cases involving loans and guarantees for their repayment a prior precise demand had to be made before the commencement of an action. In a well-considered judgment his Lordship reflected on the arguments raised in the following words at p. 308 of the report of that case:

> His [ie counsel for the defendants'] first line of argument was based on *Mok Hin Wah and Others v. United Malayan Banking Corpn Bhd* [1987] 2 MLJ 610 where the Lord President held that since bank guarantees invariably specify that the liability of the guarantor is to pay on demand, the words are not devoid of meaning or effect but make the demand a condition precedent to suing the guarantor. So it was contended before me that in order to be a proper demand and a valid course [sic – probably mistyped for 'cause'] of action, it was imperative that the notice of demand should precisely state the amount due and owing by the principal debtor so that the guarantor could elect whether to comply with it.
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> ...
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> Counsel for the defendants left it to be inferred that the only valid guarantee therefore was the second guarantee for $50,000. The plaintiffs were represented by Mr Yeoh Chong Keng. I have derived considerable assistance from his submission and the authorities which he has cited. As I have incorporated these into my judgment, it is not necessary for me to set them out separately.
>
> I agree that great care should be taken when applying *Mok Hin Wah*'s case *[supra]* to remember that it will only apply if the words of the guarantee specifically make a prior demand a condition precedent to suing the guarantor. There is no general rule that in all cases, regardless of the terms of the document, a prior precise demand is a *sine qua non* to the commencing of an action. Nor is there any general rule that a prior notice must be given in all cases. The writ itself is a notice: see *Malayan Banking Bhd v. Lim Ghee Leng* [1985] 1 MLJ 214. Nor is there any general rule that in all cases, unless the precise amount owing is correctly stated in a notice, the notice will be invalidated. The law indeed is otherwise. In *Rowlatt on Principal and Surety*, 4th Ed, p 115 it is stated:
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> > A surety has not, unless his contract so provides, any right to require a demand to be made upon him before action. If a surety ... promises to pay the principal debt 'on demand' a demand must be made upon him before he can be sued. His obligation is to pay the collateral sum, and differs from promise to pay on demand a present debt owing by the promisor. In the latter case an action can be brought at once without any other demand than the writ.

a The authorities for this proposition are contained in the text and I think that this statement correctly represents the position under Malaysian law also.

A far clearer exposition of the law on the point is given in *O'Donovan's Modern Law of Guarantee* at pp 379-382. Adopting the words of that b textbook there is no necessity for the creditor to make a demand upon the guarantor before enforcing the guarantee, unless the terms of the guarantee so required ...

...

c At page 380 of the text it says that even though the amounts under the guarantee are expressed to be payable 'on demand', the inclusion of a 'principal debtor' clause in the body of a guarantee may obviate the necessity for the creditor to make a demand. Reference is made to the comments of Walton J in *Esso Petroleum Co Ltd v. Alston Bridge Properties Ltd* [1975] 1 WLR 1474 ...

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[Emphasis mine]

In like vein in the present action, the defendant is the principal borrower and not a surety in respect of the loan. It is undeniable that events of default had occurred under cls. (k)(i) and (k)(iv) in the letter of offer when e there was a failure on the part of the defendant to make the required payment. In addition thereto, the defendant also failed to comply with cl. (h)(ii) in the letter of offer which placed a duty on the defendant to repay the principal amount of the loan by way of a "bullet" repayment at the end of twelve months from 12 November 1996. Coupled to this, there was f as well the unconditional promise of the defendant in the promissory note to pay, on 12 November 1997, the lender or the holder of the note the stipulated principal amount of the loan together with interest.

None of the provisions of the documents referred to in the foregoing paragraph ever required the plaintiff to make a demand on the defendant g for the repayment of all monies owing on and after 12 November 1997. On the contrary, these provisions were a clear exhortation to the defendant to make the requisite payment at that date. Therefore, having regard to the factual matrix of this case, no duty was cast on the plaintiff in the circumstances obtaining to make a prior demand on the defendant for the h repayment of the loan before proceeding to file this action. The inchoate cause of action which the plaintiff had against the defendant on 12 November 1996 at the time the loan was granted crystallised into a choate and valid cause of action against the defendant on 12 November 1997 when the loan and interest became due for repayment but were in fact not i repaid. The plaintiff was therefore perfectly within its rights to commence

this action without making a prior demand on the defendant for the repayment of the loan and interest which were already due and repayable by the defendant on 12 November 1997.

For all the above reasons the appeal of the defendant in encl. (8) is dismissed with costs and the decision of the registrar in respect of the O. 14 application in encl. (5) is confirmed.